MORGAN GUARANTY TRUST CO. NEW YORK

v.

LIAN SENG PROPERTIES SDN. BHD.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
WAN YAHYA J
[SUPREME COURT CIVIL APPEAL NO. 02-454-89]
29 OCTOBER 1990

COMPANY LAW: *Winding up - Locus standi.*

On 10 December 1987 the petitioner presented a petition to wind up the respondent company. The respondent company had taken a RM30 million loan from AIA, of which the petitioner had stood as guarantor. It was agreed between the petitioner and the respondent that if AIA required the petitioner to pay up any part of the guaranteed sum, the respondent shall forthwith on demand pay such amount to the petitioner.

On 23 September 1987 AIA demanded payment of RM33.32 million from the petitioner. On 9 November 1987 the petitioner demanded the aforesaid sum from the respondent which the latter failed to pay. Hence the petition to wind up the respondent company.

On 21 December 1988 the respondent filed a notice of motion to set aside the winding up petition. On 26 October 1989 the High Court set aside the petition on the sole ground that the petitioner had no *locus standi* to present the petition. The petitioner appealed.

Held:

[1] The petition should not have been struck out *in limine* and should have been heard on its merits. *Prima facie* a creditor who has not been paid has a right to file a petition for a winding-up order whatever might be his motives.

[2] The issue in this case is whether on the date of filing of the petition the respondent company was unable to pay its debts. If it is shown that the respondent company was unable to pay its debt then the fact that there is a civil suit on the same amount in another jurisdiction is neither here nor there. In any event, the debt must be disputed on some substantial grounds.

[Appeal allowed.]

Cases referred to:

Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Enterprise Sdn. Bhd. [1988] 1 CLJ (Rep) 5
I.O.C. Australia Ltd. v. Mobil Australia Ltd. [1973] 49 ALJR 176
Re Sanpete Builders (S) Pte. Ltd. [1989] 1 MLJ 393
Re King's Cross Industrial Dwellings Co. [1870] 11 Eq 149
Re Great Britain Mutual Life Assurance Society [1880] 16 Ch D 246
Re North Bucks Furniture Depositories Ltd. [1939] 2 All ER 549
Re Welsh Brick Industries Ltd. [1946] 2 All ER 197

For the appellant - G. Sri Ram (Rosli Dahlan with him); M/s. Allen & Gledhill
For the respondent - M.S. Murthi; M/s. Murthi & Partners

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

On 10 December 1987 Morgan Guaranty Trust Company of New York (the petitioner) presented a petition to have Lian Seng Properties Sdn. Bhd. (the company) wound up. It was not disputed that the company had taken a loan of RM30 million from the American International Assurance Co. Ltd. (AIA) the repayment of which together with interests and costs was guaranteed by the petitioner. The guarantee agreement between the company and the petitioner *inter alia* provided that if the guarantor notified the company that AIA had required the guarantor to pay any part of the amount guaranteed, the company should forthwith on demand pay such amount to the guarantor notwithstanding that the sum called for might not have been properly due.

It was also not disputed that there were other lenders of the company. The company's debts were secured in several other ways. One such security was a piece of land in Kuala Lumpur on which the respondent was constructing offices and apartments for sale to the general public.

Some time in April 1987 the lenders combined by entering into an agreement with the company to share among themselves the proceeds from the sales of the offices and apartments and they agreed on a common formula on the sharing to be done. The petitioner was not a party to the agreement. The lenders however reserved their rights under the instruments of lending.

The petition relied on a number of grounds. Firstly it referred to cl. 5 of the guarantee facility agreement dated 13 August 1984 that the company would unconditionally and irrevocably undertake to keep the petitioner fully indemnified in accordance with the guarantee facility agreement on all liabilities whatsoever incurred under or in connection with the agreement.

By a letter dated 23 September 1987 AIA demanded payment from the petitioner the sum of RM33,323,593.91 pursuant to the guarantee. By a letter dated 9 November 1987 following the occurrence of a number of defaults as described in the said letter, the petitioner demanded from the company the said sum. The company failed or refused or neglected to pay the said sum.

The petition also reproduced the balance sheet of profit and loss of the company which showed that liabilities exceeded assets and that the company had incurred a loss of RM11,811,100 as at 31 December 1986 as against a profit of RM1,006,292 as at 31 December 1985.

Finally the petition relied on just and equitable grounds that the company should be wound up.

On 15 April 1988 a contracting company, Pembinaan KSY Sdn. Bhd. gave notice of intention in support of the petition.

On 21 December 1988 the company filed a notice of motion seeking that the winding-up petition be set aside on the grounds that:

(a) the petitioner was not entitled to present the petition; and

(b) the petition did not disclose a cause of action.

The notice of motion was heard and on 26 October 1989 the learned Judge set aside the petition on the sole ground that in his view the petitioner had no *locus standi* to present the petition.

The learned Judge stated in his judgment that he was: *a*

> far from satisfied that the petitioner was at the material time qualified to petition the Court as it did.

p. 20 of the appeal record.

There were many red herrings thrown in below and before us but the simplest approach in this appeal is to just answer the question whether on the facts of this case as were available to the learned Judge as on the date of the petition the petition should be struck out *in limine* or should he heard. After hearing arguments and considering the facts we took the view that the petition should not have been struck out *in limine* and that it should have been heard on its merits. We accordingly allowed the appeal with costs here and below. *b*

It would appear that the trial Judge based his decision mainly on the contention of the company that the petitioner was not entitled to invoke cl. 5.2 of the guarantee agreement as the demand was "stage managed". Indeed the letter dated 23 September 1987 from the solicitors to AIA stated that they were calling on the guarantee at the request of the petitioner and this was before the execution of the Sharing Formula Agreement in which AIA was a party. The learned Judge also referred to the Sharing Formula Agreement which he regarded as a moratorium in respect of the claims against the company and that this moratorium was terminated only subsequent to the date of the petition. The Sharing Formula Agreement was terminated on 2 February 1988. *c* *d*

There was also reference made to the suit in Singapore brought against the company by the petitioner with regard to the same amount some time before the presentation of the petition and that on the date of the petition the suit was pending as a contested action in the Singapore High Court. *e*

Finally, it was submitted on behalf of the company that the appeal was academic because all monies had already been paid and this was not disputed.

It would seem to us unarguable on the facts that the petitioner had on 10 December 1987, that is, the date of filing of the petition a *prima facie* right of an unpaid creditor to file the petition. There was no evidence that the payment was "stage managed" and even if it was, it would make no difference as: *f*

(a) the petitioner was in our view entitled to invoke cl. 5.2 of the guarantee agreement; and

(b) *prima facie* a creditor who is not paid has a right to file a petition for a winding-up order whatever may be his other motives.

See also *Re Sanpete Builders (S) Pte. Ltd.* [1989] 1 MLJ 393. It is not good law that only a creditor who feels goodwill towards his debtor is entitled to a winding-up order - *I.O.C. Australia Ltd. v. Mobil Australia Ltd.* [1973] 49 ALJR 176 at p. 182. *g*

The sharing formula agreement cannot be read against the petitioner as the petitioner was not party to it.

As regards payment of all the monies since then we are concerned only with the date of filing of the petition and not with events that happened subsequent to that. *h*

The issue is whether on the date of filing of the petition the company was unable to pay its debts. If it is shown by some evidence that the company was unable to pay its debt then the fact that there is a civil suit on the same amount in another jurisdiction is neither here *i*

nor there. In any event the debt must be disputed on some substantial grounds: see *Re King's Cross Industrial Dwellings Co.* [1870] 11 Eq 149 and *Re Great Britain Mutual Life Assurance Society* [1880] 16 Ch D 246 where Jessel MR said at p. 253:

> ...in my opinion it is not sufficient for the respondents, upon a petition of this kind, to say 'we dispute the claim'. They must bring forward a *prima facie* case which satisfies the Court that there is something which ought to be tried, either before the Court itself, or in an action, or by some other proceeding.

There are many tests to be applied to see whether a petitioner for a winding-up order has *locus standi*. Insolvency is always a ground relied on in a petition. *Prima facie* an unpaid creditor is entitled to petition for a winding-up order against a company which fails to pay its debt. Macpherson says that the only test which seems capable of resolving all difficulties is that suggested by Crossman J in *Re North Bucks Furniture Depositories Ltd.* [1939] 2 All ER 549 namely that the term "creditor" "includes every person who has the right to prove in winding-up."

Looking at the grounds given in the petition in the instant case it is clear to us that the petition should not have been struck out *in limine* and should have been heard on its merits. This was the approach of this Court in *Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Enterprise Sdn. Bhd.* [1988] 1 CLJ (Rep) 5.

The appellant should not be prevented from pursuing its petition so that the Court would be able to consider all evidence and determine whether it should exercise its discretion to order winding-up or not.

Relevant to this appeal is that part of the judgment in *Chip Yew Brick Works Sdn. Bhd.* which appears at p. 6:

> Even where the whole amount of debt claimed is disputed, the Court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the Court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd.* [1946] 2 All ER 197.

Also found at [1991] 1 CLJ 260